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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

In re A.M., et al., Persons Coming Under
the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

C.M.,

Defendant and Appellant.

B211553

(Los Angeles County
Super. Ct. No. CK33181)

APPEAL from an order of the Superior Court of Los Angeles County. Jacqueline H. Lewis, Judge. Affirmed.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

C.M. (mother), mother of A.M., born in March 1998, and J.E., born in October 2005, appeals from an order of the juvenile court terminating her parental rights pursuant to Welfare and Institutions Code section 366.26.¹ Mother argues that the juvenile court erred in failing to apply the beneficial contact exception to termination of parental rights found in section 366, subdivision (c)(1)(B)(i). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother was 19 years old when A.M. was born. A.M. tested positive for methamphetamines at her birth. A.M. was declared a dependent of the juvenile court, and mother was offered services.² Reunification was successful and the case was closed in July 1999.

On November 14, 2006, mother was admitted to the hospital on a 72-hour hold after cutting her wrists with a kitchen knife. She reported feeling paranoid with delusional fears that people were going to hurt her. Mother was diagnosed as bipolar with depression, and admitted to mixing antidepressants with methamphetamines. She was under the care of a physician, but was subsequently discharged.

1. Initial detention

On January 5, 2007, the Department of Children and Family Services (DCFS) received a referral alleging that mother neglected eight-year-old A.M. and her one-year-old brother, J.E. Mother was alleged to be using drugs in front of the children and leaving them unattended when she was under the influence of drugs. DCFS made an unannounced visit to the motel where mother was reported to be staying with her children. The social worker found the motel room dirty and full of trash. Mother informed the social worker that she did not have a stable residence. Though she initially denied drug use, she later admitted that she began using methamphetamines in the summer of 2006. Mother used drugs at least once a month, and had last used drugs just

¹ All further statutory references are to the Welfare and Institutions Code.

² A.M.'s birth certificate named no father, and DCFS conducted an unsuccessful search for the unknown father.

three days before her interview with the social worker. She also admitted to mixing the drugs with antidepressants. Mother stated that she used drugs due to depression because her boyfriend was incarcerated.³ Mother's boyfriend had numerous drug related arrests and convictions.

A team decision making meeting was held with mother and maternal aunt present. The parties determined that the children should be detained in the home of maternal aunt.

On January 10, 2007, DCFS filed a section 300 petition alleging that mother's former and current drug use, mother's boyfriend's drug use, and mother's mental health issues placed the children at substantial risk of harm. On the same date, the juvenile court ordered the children detained with maternal aunt and ordered DCFS to provide mother with referrals for drug rehabilitation and counseling with random drug testing, parenting classes, and individual counseling. The court also ordered monitored visits for mother.

2. Jurisdiction/disposition

DCFS filed a jurisdiction/disposition report on February 7, 2007. In an interview on February 1, 2007, mother reported that she had started using methamphetamines when she was 20 years old and last used about a week prior to the interview. She admitted that she had been diagnosed with bipolar disorder, that she heard voices telling her to hurt herself, and that she was aware that A.M. had seen her talking to herself. A.M. confirmed that she had witnessed her mother talking to herself and "thought that was crazy." On February 7, 2007, the matter was continued to March 8, 2007, for a pretrial resolution conference.

On March 7, 2007, DCFS notified the juvenile court that mother had left her residential treatment program on or about February 5, 2007, because she continued to hear voices that told her to leave. Mother refused to provide DCFS with her address, but reported that she was still visiting the children on a weekly basis.

³ Mother's boyfriend, who is the father of J.E., does not appeal termination of his parental rights. He shall be referred to throughout this opinion as "boyfriend" or "mother's boyfriend."

On March 8, 2007, mother made her first appearance in juvenile court. She pled no contest to the amended section 300 petition. The juvenile court declared the children dependents of the court and ordered a reunification plan for mother to include drug rehabilitation with random testing, individual counseling to address case issues with a psychiatrist, compliance with prescribed medications, and 12-step meetings. Mother was granted monitored visits.

3. Reunification period

DCFS filed an interim review report on June 26, 2007. The children remained with their maternal aunt. They were thriving in her care, and appeared comfortable in the home. Maternal grandmother was providing childcare while the maternal aunt worked. Mother was participating in drug rehabilitation counseling; however, she had tested positive for drugs on one occasion. Mother's visits continued to be monitored.

The children were evaluated. A.M. was described as having become more vigilant after her mother's suicide attempt. A.M. had also told a friend that she wanted to die; however, she later stated that she was only kidding. A.M. took care of J.E., showing some signs of parentification. She was unable to read and write, and had been referred for an IEP assessment. J.E. had exhibited an initial "grief reaction" when separated from mother, but had quickly adjusted to his new living situation and was described as a happy toddler.

A.M. had adapted well to living with her aunt but expressed an interest in maintaining a relationship with her mother and returning home.

DCFS filed a report on the six-month review date of August 10, 2007. DCFS reported that mother continued efforts to complete her case plan, and seemed committed to reunifying with her children. Mother had been visiting regularly with her children, and the visits seemed beneficial to the children. DCFS recommended further services for mother, which the court granted.

However, by the time of the 12-month review hearing on February 14, 2008, mother had fallen out of compliance with her case plan. Mother had entered an in-patient substance abuse program on August 28, 2007. On October 19, 2007, she tested positive

for drugs for a second time and was dismissed from the program after several failures to appear thereafter. Mother had been living with her boyfriend, although he was back in jail as of January 2008 with a sentence of 90 days.

Mother also failed to comply with the mental health component of her plan, and failed to take her prescribed medications. On March 1, 2008, she experienced a mental health episode during which she became very paranoid and was placed on a hospital hold.

On February 10, 2008, mother had readmitted herself into an in-patient recovery program. However, mother left the program on March 6, 2008, having “made a decision to walk out ” after receiving consequences for deviating from her recovery plan.

On April 15, 2008, DCFS informed the court that mother “has been a very important part of her children’s lives.” However, DCFS regretfully informed the court that DCFS had to recommend termination of mother’s reunification services.

In an interim review report dated May 27, 2008, DCFS informed the court that mother was still living with her boyfriend. She stated that she loved him and was “torn” because she knew she could not break free from her addiction unless she left him. Her sponsor offered to take her to a sober living home but did not believe that she was serious about recovery. DCFS notified the court that A.M. stated that she was happy at her school and that she was receiving very good care from her aunt. A.M. indicated that she wanted to stay with her aunt until she was grown up, but loved mother and still wanted to see her. Maternal aunt had already agreed that continuing contact with mother would be permitted as long as it was safe.

On April 15, 2008, the juvenile court ordered that mother’s reunification services be terminated, and referred the children for permanency planning. DCFS recommended adoption as the best permanent plan for A.M. and J.E. Maternal aunt was reported to be strongly committed to taking care of the children. She had obtained new housing, and was working full time. Maternal grandmother picked the children up from school and made dinners. A homestudy of maternal aunt’s home was initiated.

4. Section 366.26 permanency planning

At the time of the section 366.26 hearing on August 12, 2008, the adoptive homestudy was not complete. The hearing was continued to October 7, 2008, for completion of the homestudy. In its section 366.26 report, DCFS stated that mother and her boyfriend had been visiting the children occasionally, but the visits were disrupted with mother's recent hospitalization and readmission into a drug program. Maternal aunt facilitated visits among the children and their extended family members, such as their grandmother, cousins, and paternal relatives.

A.M. was willing to be adopted by maternal aunt but wanted to be able to continue seeing mother. J.E. was still too young to make a meaningful statement regarding adoption, but appeared to be strongly bonded to his prospective adoptive parent.

On September 23, 2008, the aunt's homestudy was approved. Mother appeared in court for the section 366.26 hearing on October 7, 2008. Counsel for mother objected to termination of parental rights, but did not specify why. The court found that the children were likely to be adopted, ordered adoption as the children's permanent plan, and terminated the parental rights of both mother and her boyfriend.

In rendering its decision, the juvenile court noted that the beneficial contact exception to termination of parental rights did not apply. It stated "the benefit to the children of a permanent home far outweighs any incidental benefit from the continued relationship with the parents." The court further explained, "while there have been some visits by the parents, those have not been regular and consistent."

On October 20, 2008, mother filed a notice of appeal from the court's order terminating her parental rights.

DISCUSSION

I. Standard of review

We review the juvenile court's rejection of the exception to termination of parental rights found in section 366.26, subdivision (c)(1)(B)(i), for substantial evidence.⁴ (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1207 (*Jerome D.*)). The evidence supporting the juvenile court's findings must be reasonable, credible, and of solid value. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1319.) The question on review is not whether the evidence supported a different order, but whether substantial evidence supported the order that was made. (*Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal.App.4th 189, 207.)

II. Section 366.26 and the beneficial relationship exception

Section 366.26 is applicable if a child is not returned to his or her parent within 18 months of the initial removal order. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249.) At the section 366.26 hearing, if the juvenile court determines, "by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption." (§ 366.26, subd. (c)(1).) The court is required to terminate parental rights under these circumstances unless it finds that one of the exceptions listed within section 366.26 applies. Once the juvenile court finds that the child is adoptable, the parent bears the burden of proof that one or more of the enumerated exceptions to termination of parental rights exist. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343.) The statute reflects the Legislature's strong preference for adoption as a permanent plan, rather than the other, nonpermanent forms of placement. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

⁴ DCFS argues that mother forfeited this issue by failing to specifically raise it in the juvenile court. However, we note that mother did object generally to the termination of her parental rights, and, in specifically addressing this exception, the juvenile court appeared to interpret her objections as based on the exception found in section 366.26, subdivision (c)(1)(B)(i). Therefore, we exercise our discretion to address the merits of mother's claim, even if it was not properly preserved for review. (See *People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6 ["An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party"].)

Mother does not contest the juvenile court's finding that A.M. and J.E. are adoptable. However, she argues that the beneficial relationship exception, found in section 366.26, subdivision (c)(1)(B)(i), is applicable. Under section 366.26, subdivision (c)(1)(B)(i), the court may decline to terminate parental rights if it finds "a compelling reason for determining that termination would be detrimental to the child" because "the [parent has] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

Thus, in order for a juvenile court to apply this exception, it must find that termination of parental rights would be detrimental to the child because (1) the parent has maintained regular visitation and contact; and (2) the child would benefit from continuing the relationship. As set forth below, we find that substantial evidence supports the juvenile court's determination that the required elements of this exception were not present in this case.

III. Substantial evidence supports the juvenile court's determination that the beneficial relationship exception to termination of parental rights did not apply

A. Regular visitation and contact

The juvenile court specifically found that, while mother had visited the children, the visits were not "regular and consistent," as required by section 366.26, subdivision (c)(1)(B)(i). Substantial evidence supports this determination.

Although mother's visits with her children were regular at first, they became inconsistent and irregular throughout the proceedings. In early 2007, mother reported visiting the children on a weekly basis. The monitored weekly visits continued through the spring of 2007. However, by early 2008, mother had fallen out of compliance with her reunification plan, and her visits were described as "occasional." At the time of the initial section 366.26 hearing in August of 2008, DCFS reported that mother's visits with the children had been "disrupted" by mother's recent hospitalization and her participation in an in-patient program which prevented her from visiting the children.

Thus, mother's weekly monitored visits became less frequent throughout the proceedings. By the time of the section 366.26 hearing, they had moved from

“occasional” to nonexistent due to mother’s participation in a program which did not permit her to see the children. Mother’s inconsistent visits were insufficient to allow for the “consistent, daily nurturing” that marks a parental relationship. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The juvenile court’s finding that mother had failed to maintain the requisite “regular visitation and contact” with A.M. and J.E. under section 366.26, subdivision (c)(1)(B)(i), is amply supported.

B. Beneficial relationship

As set forth below, even if mother could show regular visitation and contact with A.M. and J.E., she has failed to show that the children would sufficiently benefit from the relationship such that the exception applies.

Section 366.26, subdivision (c)(1)(B)(i), does not define the type of parent-child relationship that will trigger the exception. However, courts have required more than just “frequent and loving contact” to establish the requisite benefit for this exception. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534.) Mother was required to show that her relationship with A.M. and J.E. promoted their well-being “to such a degree as to outweigh the well-being the [children] would gain in a permanent home.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) “Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.” (*Ibid.*) In other words, “If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*Ibid.*)

The facts do not support the existence of such a beneficial relationship. Mother’s failure to progress through her reunification plan provides evidence that she was unable to provide the type of positive relationship that would promote the children’s well-being. Her visits never moved beyond monitored. (See *In re Andrea R.* (1999) 75 Cal.App.4th

1093, 1109 [rejecting parent’s claim of exception when her visits never moved beyond monitored].) She did not complete a drug treatment program, and failed to maintain her mental health treatment. While A.M. was able to express her love for mother, and her desire to maintain a relationship with her, she also stated that she wanted to live with her maternal aunt until she was grown up. Under the circumstances, despite the natural familial bond between mother and her children, the court did not err in finding that the beneficial relationship exception was inapplicable.

Mother emphasizes the amount of time that the children spent in her care. Specifically, she argues that A.M. was in her care for the first nine years of her life, thus developing a strong primary bond. However, we note that this case represents the second time that A.M. was removed from mother’s care. A.M. was also removed from mother as an infant, and the court’s jurisdiction lasted almost 16 months. In addition, the years A.M. spent in mother’s care did not prevent A.M. from expressing a desire to be adopted by maternal aunt. A.M. was aware of her mother’s ongoing mental health problems. A.M. had witnessed her mother talking to herself when she heard voices, and thought it was crazy. A.M. became more vigilant after mother’s attempted suicide, and took on a parental role with J.E. These facts support the juvenile court’s determination that A.M.’s relationship with mother was not the type of positive emotional attachment required to support application of the beneficial relationship exception.

J.E. is only three years old. He was in mother’s care for the first 15 months of his life and then he was out of her care for the next 21 months of his life. And while he went through an initial grief reaction upon separation from mother, he quickly adjusted to his new home with maternal aunt where he became a “happy toddler who is loving, affectionate and a very curious child.” While mother argues that she nevertheless developed a strong, primary relationship with J.E., the facts support the juvenile court’s decision that, at the time of the section 366.26 hearing, mother did not “stand in a parental role” to J.E. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420.) The relationship was not sufficiently beneficial to overcome the preference for adoption.

Mother attempts to analogize this case to *Jerome D.*, *supra*, 84 Cal.App.4th 1200 and *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*). Both cases are factually distinguishable. In discussing the application of the beneficial relationship exception to termination of parental rights, the *Jerome D.* court did note that the nine-year-old boy had spent the first six and one-half years of his life in his mother's care. (*Jerome D.*, *supra*, at p. 1207.) However, in contrast to the situation before us, Jerome had unsupervised overnight visits in his mother's home, which allowed for the maintenance of the "strong and well-developed" parent-child relationship between them. (*Ibid.*) As discussed above, mother's visits with her children throughout the dependency proceedings were inconsistent, and remained monitored due to mother's failure to progress in her treatment. Under these circumstances, mother could not provide the nurturing, parental relationship that Jerome's mother provided. Similarly, in *S.B.*, the parent maintained regular, consistent visits with S.B. three times per week throughout the dependency proceedings. Further, the parent fully complied with "every aspect" of his case plan. (*S.B.*, *supra*, at p. 298.) The Court of Appeal concluded that under those circumstances, the parent was able to maintain "a parental relationship with S.B. through consistent contact and visitation." (*Id.* at p. 300.) In contrast, mother's failure to maintain consistent contact or comply with her case plan prevented the maintenance of her parental role in her children's lives.⁵

C. Detriment

Underlying this exception to termination of parental rights is the concern that severing the parent-child relationship will be detrimental to the child. The juvenile court's finding that A.M. and J.E. would not suffer detriment upon termination of mother's parental rights was amply supported. While A.M. expressed a desire for ongoing contact with mother, maternal aunt had agreed to assist in that goal. Maternal aunt consistently exhibited her willingness to facilitate the children's relationships with their family members. She provided them with visits with their maternal grandmother,

⁵ *In re Amber M.* (2002) 103 Cal.App.4th 681, is similarly distinguishable because the mother in that case "visited as often as she was allowed . . . and did virtually all that was asked of her to regain custody." (*Id.* at p. 690.)

cousins, and J.E.'s paternal relatives, as well as making the children available for visits with mother and her boyfriend throughout the reunification period. Thus, substantial evidence supports the juvenile court's determination that the children will not suffer detriment through a complete severance of their parental relationship with mother.

We conclude that the juvenile court properly determined that section 366.26, subdivision (c)(1)(B)(i) was not an impediment to the termination of mother's parental rights.

IV. The juvenile court did not err in selecting adoption as the children's permanent plan

Mother argues that the facts of this case call for a permanent plan of guardianship, rather than adoption. She refers to *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 for the proposition that, where a child will be harmed by the termination of parental rights, the court must consider guardianship as an alternative permanent plan. Legal guardianship, mother argues, would provide the children with a primary parent but also preserve the warm relationship they had with mother.

Mother's argument is insupportable under the law. When children are adoptable and no exceptions to adoption exist, the juvenile court must terminate parental rights. (§ 366.26, subd. (c)(1) [if "it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption"]; *In re Cody W.* (1994) 31 Cal.App.4th 221, 230-231 [legal guardianship and long-term foster care are not considered by the court until adoption and termination of parental rights have been rejected].) Because A.M. and J.E. were adoptable and no exceptions to termination of parental rights existed, the juvenile court would have erred if it failed to order adoption as the children's permanent plan.

DISPOSITION

The order is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST